SENSE AND NONSENSE ABOUT STATE IMMUNITY

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Defending the state immunity principle of *National League of Cities v. Usery*[1] is a lonely and somewhat suspect task for a constitutional scholar today. Having played a small contributing part[2] in precipitating that controversial decision, however, this writer perhaps has some modest obligation to attempt to illuminate the debate.

The judicial and academic discussions of *National League of Cities* contain a great deal of nonsense on both sides of the issue. The single most troublesome bit of nonsense is the idea that the principle somehow derives from the tenth amendment. To be sure, that attribution is made by its judicial proponents, but it is woefully inapt. Another recurrent mistake is the claim that *National League of Cities* is a revival of the long-discredited "dual federalism" doctrine. Yet another is the notion that the principle is tied to the commerce clause. In fact, *National League of Cities* itself was not truly a "commerce clause case." *National League of Cities*, like most of *United States v. Darby*[3] actually turned on the necessary and proper clause.[4] In *Darby* at least, if lamentably not in *National League of Cities*, the distinction was plainly indicated.[5] That clause provides ample textual basis for a state immunity principle.

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1. 426 U.S. 833 (1976).

2. The author was retained by counsel for the National League of Cities, et. al., as a consultant pending rebriefing and reargument of the case at the 1975 Term. A memorandum by the author, including some excessively sharp language, was slightly altered without the author's review and submitted to the Court as an amicus brief on behalf of the National Association of Counties and the National Association of County Civil Attorneys; it remains a source of slight embarassment to the author.

3. 312 U.S. 100 (1941).

4. *Id.* at 117-24 (involving sections 6, 7, and 15(a)(2) of the original Fair Labor Standards Act). This is to be distinguished from that part of the opinion discussing section 15(a)(1), *id.* at 112-17.

5. According to the *Darby* Court, Congress's power reaches intrastate activities when "regulation of them [is an] appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce," citing McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819), the premier construction of the necessary and proper clause. 312 U.S. at 118-19.

The state immunity principle has a pedigree of legitimacy confirmed by the same post-New Deal justices who finally laid the "dual federalism" error to rest. Moreover, a largely unnoticed footnote in a Supreme Court opinion subsequent to *National League of Cities* confirms that the state immunity principle applies beyond the commerce clause and even the necessary and proper clause.

These rather unconventional observations, the reader will doubtless agree, require some elaboration and documentation. It will be useful to start with a careful exposition of the "dual federalism" concept—the error of which the state immunity principle is often wrongly accused.

I

The Constitution plainly contemplates a nation of "states"; but it is less plain what the term "state" might mean. Indeed, the term is clearly used with quite different meanings in different parts of the Constitution. The Supreme Court confronted this problem in *Texas v. White*, where Chief Justice Chase observed that the term

> describes sometimes a people or community of individuals united more or less closely in political relations, inhabiting temporarily or permanently the same country; often it denotes only the country or territorial region, inhabited by such a community; not infrequently it is applied to the government under which the people live; at other times it represents the combined idea of people, territory, and government.

Pressing for the most fundamental meaning of the term, Chase continued:

> It is not difficult to see that in all these senses the primary conception is that of a people or community. The people, in whatever territory dwelling, either temporarily or permanently, and whether organized under a regular government, or united by looser or less definite relations, constitute the State.[6]

It was with respect to states in this primary conception of "community" that Chase declared, "[t]he Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible states." It is likewise in this primary sense "of a people or political community, as distinguished from a government," that the term state is used, according to *Texas v. White*,

> in the clause [of the Constitution] which provides that the United States shall guarantee to every State in the Union a republican form of government, and shall protect each of them against invasion.

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6. See 74 U.S. (7 Wall.) 700, 720 (1869) for these passages.

> In this clause a plain distinction is made between a State and a government of a State.

Taking "state" in this sense, secession and participation in the Confederacy could not render the political community within the boundaries of Texas less than a constituent state of the Union—although those efforts were sufficient to divest that community of any lawful state government.[7]

Had the Constitution used the term "state" consistently in this sense, the dual federalism notion would have had less foundation. Putting aside those provisions in which the term is used plainly with a geographical meaning,[8] however, there are several clauses where it is used to include state governments, as Chief Justice Chase observed.[9] These clauses provide a colorable basis for the misapprehension that it was the state governments that combined to constitute the Union. But James Madison had highlighted the absurdity of this misconception in *The Federalist*:

> Was then the American revolution effected, . . . was the precious blood of thousands spilt, and the hard earned substance of millions lavished, not that the people of America should enjoy peace, liberty and safety; but that the Governments of the individual States . . . might enjoy a certain extent of power, and be arrayed with certain dignities and attributes of sovereignty?[10]

The basic precept of republican government is that it is the people—the political communities collected as states in the Union—and *not their governments*, in which sovereignty inheres.[11]

Unfortunately, just three years after *Texas v. White*, the Court lost sight of this crucial point when it decided *Collector v. Day*.[12] Throughout that opinion, "states" and their governments are equated. From this false equation derives the notion that

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7. *Id.* at 725, 721, and 726, respectively. Remaining a "state" in this sense, the Court held, Texas was entitled to invoke the Supreme Court's original jurisdiction, even through *de facto* officials of challengeable legal authority undertaking to act on the state's behalf. *Id.* at 731-32.

8. "[A]s in the clauses which require that a representative in Congress shall be an inhabitant of the State in which he shall be chosen, and that the trial of crimes shall be held within the State where committed." 74 U.S. (7 Wall.) at 721.

9. "In the Constitution the term "state" most frequently expresses the combined idea . . . of people, territory and government. . . . In the clauses which impose prohibitions upon the State in respect to the making of treaties, emitting of bills of credit, and laying duties on tonnage, and which guarantee to the State representation in the House of Representatives and the Senate, are found some instances of this use in the Constitution. Others will occur to every mind." 74 U.S. (7 Wall) at 721. Treaties, bills of credit, and duties are acts of *governments*; and senators were chosen by state *governments* until ratification of the seventeenth amendment in 1913.

10. THE FEDERALIST No. 45, at 309 (J. Madison) (J. Cooke ed. 1961).

11. Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793); see particularly the opinions of Wilson, J., and Jay, C.J.

12. 78 U.S. (11 Wall.) 113, 126 (1871). *See also* Lane County v. Oregon, 74 U.S. (7 Wall.) 71, 76 (1869).

"[t]he two *governments* are upon an equality. . . . [I]n respect to the reserved *powers*, the State is as sovereign and independent as the General Government." Confounding the states with their *governments, Collector v. Day* made "dual federalism" the foundation for a tax immunity of state government instrumentalities.

Chase had made it clear in *Texas v. White* that he was using the term "state" in its primary sense of a "political community" when he wrote of "the right of self-government by the States."[13] The sovereign political community constituting a state can exercise its "right of self-government" through those *national* instrumentalities of governance that it chooses to employ jointly with affiliated communities, as much as through those peculiar governing institutions it might choose to erect on its own. A political community occupying a discrete geographical area but lacking any separate governing institutions is an anomaly not to be found outside the federal capital except in such extraordinary circumstances as were presented by the Civil War. Consequently, a sensible principle of state immunity must indeed take account of states' *governments*, as well as the political communities themselves. It must take account of those governments, however, not as entities entitled to respect for their own sakes, but rather as the instruments chosen by the sovereign people of one or another discrete political community to satisfy some of their needs.

Governments satisfy the needs of political communities by exercising power. As Madison observed, in defining the boundary between the power of state and federal governments one confronts difficulties inherent in language.[14] The Constitution provides that "Congress shall have Power" to do a variety of things. But "power" is only "the ability or faculty of doing a thing."[15] The term denotes legal competence to take action concerning some subject matter; this is true whether one speaks of a "power of appointment," a "power of attorney," or judicial, executive, or legislative "power." What are enumerated, then, in the Constitution are the several subject matters with which the national legislature

13. 74 U.S. (7 Wall) at 725.

14. [N]o language is so copious as to supply words and phrases for every complex idea, or so correct as not to include many equivocally denoting different ideas. . . . [T]his unavoidable inaccuracy must be greater or less, according to the complexity and novelty of the objects defined. . . . Here then are three sources of vague and incorrect definitions; indistinctness of the object, imperfection of the organ of conception, inadequacies of the vehicle of ideas. Any one of these must produce a certain degree of obscurity. The Convention, in delineating the boundary between the Federal and State jurisdictions, must have experienced the full effect of them all.

THE FEDERALIST No. 37, at 236-37 (J. Madison) (J. Cooke ed. 1961). *See also id.* at 235.

15. *Id.*, No. 33, at 204 (A. Hamilton).

has power to deal. There may be disputes as to the nature or scope of those subject matters, because human activities sometimes can be characterized with equal propriety in different ways. In practice, choices must constantly be made as to which characterizations should have legal effect; but to say that the federal government has power as to certain subject matters is more accurate than to say it has a bundle of different powers.

Several constitutional clauses, however, including the tenth amendment, do use the plural, "powers." Taking too literally this verbal shorthand, "dual federalism" reified the enumerated categories of congressional competence as separate things. State and federal legislative directives applied to the same subject matter then had to be posited as assertions of different "powers." The Constitution thus was conceived as slicing the whole of lawmaking competence into separate segments, allocated between nation and states. A natural corollary of this pie-slicing conception was that national and state governments should each be forbidden to nibble at the other's plate.

The "dual-federalism" error was expressed in two ways. One was judicial disapproval of congressional legislation that, by dealing with one of the enumerated subject matters, attempted to influence some nonenumerated matter. To the "dual federalist," this constituted congressional nibbling at the states' piece of pie, and therefore was constitutionally foreclosed. Hamilton and others had understood the Constitution better. Although Hamilton's ambitious plan for using Congress's power in several respects to encourage manufactures was not enacted, Story recounted several early examples of federal spending to promote Congress's policy regarding concerns extraneous to the constitutional enumeration.[16] Holmes merely restated Hamilton's thesis in his classic *Hammer v. Dagenhart* dissent.[17]

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16. Hamilton, *Report on Manufactures*, ANN. OF CONG., 2d Cong., 1st Sess., 971-1034 (1791), *reprinted in* 3 THE WORKS OF ALEXANDER HAMILTON 192 (J.C. Hamilton ed. 1851); J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES secs. 975, 977-78, at 715, 727-28 (5th ed. 1891).

17. 247 U.S. 251, 277 (1918) (dissenting opinion). Holmes, of course, was discussing the principle in the context of regulations of interstate commerce, not in the context of spending; but the principle is generic.

Hamilton was clear that success in achieving Congress's will on extraneous matters must depend wholly upon the effectiveness of the particular instrument chosen, since accomplishment of such extraneous ends was not ensured by the supremacy clause. *See* his *Report on Manufactures, supra* note 16, ANN. at 1012, 3 THE WORKS OF ALEXANDER HAMILTON at 250-51. In a neglected but important opinion, the Supreme Court affirmed that state law may operate to frustrate extraneous objectives sought by congressionally authorized conditions to a license for doing interstate commerce. Regents v. Carroll, 338 U.S. 586 (1950). The point more frequently has been acknowledged in connection with extraneous ends of spending measures. *See, e.g.*, King v. Smith, 392 U.S. 309, 316 (1968); Oklahoma v.

The second expression of "dual federalism" was a revival of Thomas Jefferson's miserly construction of the necessary and proper clause. The extreme illustration is Justice Sutherland's 1936 majority opinion in *Carter v. Carter Coal Co.*[18] The Supreme Court's return toward sound constitutional thinking was gradual. *N.L.R.B. v. Jones & Laughlin Steel Corp.* upheld the NLRA only because Chief Justice Hughes and others disregarded Congress's findings (which they thought transcended its powers under the necessary and proper clause) and construed the act narrowly.[19] Only later was the classic view of the necessary and proper clause, as articulated by Hamilton, again clearly endorsed. As explained by Hamilton, the necessary and proper clause authorizes Congress to make laws respecting subject matters extraneous to those enumerated as its "legitimate" concerns, *insofar as* those laws are reasonably deemed by Congress to be means of effectuating federal policy on some enumerated subject.

The proper judicial role, when legislation under the necessary and proper clause is challenged, is to ascertain that the *particular* legislative dictate has been determined by Congress with some rational basis to be significantly conducive to some enumerated federal concern. Some examples of careless departure from this principle, countenancing unsupportable reaches of federal power, can be found among the cases, which nonetheless as a whole illustrate the principle well.[20] Unfortunately, pervasive employment of the inapt idiom "affecting interstate commerce" has often concealed the operation of the principle. Today, influential commentators and justices alike uncritically recite that Congress has power to regulate activities that "affect interstate commerce," and Congress has enacted a good deal of legislation on this faulty premise. Some commentators even maintain that the "affecting commerce" principle is independent of the necessary and proper clause, and some present justices seem stubbornly unwilling to give fresh

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Civil Service Comm'n, 330 U.S. 127 (1947). *See generaily* Engdahl, *Preemptive Capability of Federal Power*, 45 U. COLO. L. REV. 51 (1973).

18. 298 U.S. 238 (1936).

19. 301 U.S. 1 (1937). As to the necessary and proper clause application, see especially *id.* at 29, 30, 34-40.

20. For examples of Congressional overreaching, see certain particular provisions of the Surface Mining Control and Reclamation Act, unsupportable but upheld in Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, and Hodel v. Indiana, 452 U.S. 314 (1981). As to some of the provisions referred to, see Engdahl, *Some Observations on State and Federal Control of Natural Resources*, 15 HOUSTON L. REV. 1201, 1214-18 (1978). For a more detailed discussion of the cases applying the necessary and proper clause, see Engdahl, *Constitutionality of the Voting Age Statute*, 39 GEO. WASH. L. REV. 1, 8-11 (1970); Engdahl, *Preemptive Capability of Federal Power*, 45 U. COLO. L. REV. 51, 58-62 (1973).

thought to the point. Others, while their thinking unfortunately is still encumbered by the familiar idiom, are struggling to reclarify the sound principle articulated by Hamilton (and by Chief Justice Marshall).[21] They have yet to perceive, however, its most critical feature: that the necessary and proper clause contemplates a particularity of means. Congress does not have general legislative power over an extraneous subject matter merely because that matter affects interstate commerce; it has power to impose on that matter only particular legislative directives that are rationally found to be substantially conducive to some "legitimate" end—"legitimate" in the sense of being within the scope of enumerated federal concerns.

II

With this background one can begin to see both the error of attributing the state immunity principle to the tenth amendment and the related error of denouncing it as a revival of "dual federalism" thought. Rightly conceived, the principle of state immunity pertains to "states" in the sense of "political communities," not to the power of state governments. Preservation of the power of state governments is the focus of "dual federalism," for whose exponents the tenth amendment has always been the rallying flag. Inspired by *National League of Cities*'s unfortunate invocation of that amendment, lawyers for state governments promptly endeavored to mark out certain subject matters as exclusively subject to state governments' power. Those efforts—which *were* reminiscent of the "dual federalism" error—failed.

The tenth amendment merely affirms that the sovereign people have allocated the legislative (as well as the executive and judicial) power of governance among two levels of government and themselves. The amendment says nothing whatever of immunities or rights. The only "right" properly viewable as inhering in states as sovereigns is the right of self-government; that right inheres in the states as political communities. The tenth amendment affirms that each political community within the Union conferred the power of governing its members upon more than one set of institutions; it does not, however, confer "rights" or "immunities" on state governments.

The power conferred upon the national institutions of gov-

21. For further discussion, see Engdahl, *The Federal Lands Program Under SMCRA*, 26 ROCKY MT. MIN. L. INST. PROCEEDINGS 117, 130-31 (1981). For examples of the erroneous views of the commentators, see, e.g., J. NOWAK, R. ROTUNDA, & J. YOUNG, CONSTITUTIONAL LAW 161 et seq. (2d ed. 1983); B. SCHWARTZ, CONSTITUTIONAL LAW 95 et seq. (1972); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 232 et seq. (1978).

ernment is neither described nor delimited by the tenth amendment itself. Of course, as Justice Frankfurter rightly affirmed, "the fact that ours is a federal constitutional system, as expressly recognized in the Tenth Amendment, carries with it implications."[22] Those implications, however, derive not from the tenth amendment itself, but rather from the fact that ours is a federal system—a fact the amendment merely emphasizes.

The power conferred upon the national government of course includes legal competence to do what is contemplated by the necessary and proper clause. But such laws must be both "necessary" (in the Hamiltonian, not the Jeffersonian, sense) to effectuate federal policy for an enumerated subject matter, and also "proper." In elaboration of the latter requirement, Hamilton wrote in his opinion on the constitutionality of the United States Bank:

> There is also this further criterion, which may materially assist the decision: Does the proposed measure abridge a pre-existing right of any State or of any individual? *If it does not*, there is a strong presumption in favor of its constitutionality, and *slighter relations to any declared object of the Constitution may be permitted to turn the scale.*[23]

The phrase, "a pre-existing right of any State," must be understood as referring to the rights of states as political communities, not to any entitlement of state governments to their own slice of the pie. Hamilton's point was that a stronger telic relation to some "declared object of the Constitution" is as appropriate when a law impinges upon the interests of the people as discrete political communities, as when it impinges on individuals' interests.[24] Chief Justice Marshall intimated the same point in *McCulloch v. Maryland* when he explained that to pass muster under the necessary and proper clause, a law must not only be adapted to an end "legitimate" in the sense of being "within the scope of the constitution," but also must "consist with the letter *and spirit* of the Constitution."[25] The clause contemplates that in making laws regarding nonenumerated subject matters, the national legislature must respect the spirit of federalism that pervades the entire Constitution. That spirit does *not* reserve certain subject matters for governance at the state level; but it *does* require that the states as separate political communities be acknowledged, and that their

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22. New York v. United States, 326 U.S. 572, 575 (1946).

23. Hamilton, *Opinion as to the Constitutionality of the Bank of the United States* (1791), *reprinted in* 4 THE WORKS OF ALEXANDER HAMILTON 104, 113 (J.C. Hamilton, ed., 1851) (emphasis added).

24. Anything short of an absolutist application of the Bill of Rights requires judgment as to the degree and seriousness of infringement, the government interests promoted by it, and the relation of means to end.

25. 17 U.S. (4 Wheat.) 316, 421 (1819) (emphasis added).

right as discrete communities to employ sub-national governments to serve their particular needs not be disregarded.

This same spirit of the Constitution crosses the gamut of federal power even apart from the necessary and proper clause. Indeed, the principle of state immunity was endorsed by the post-New Deal Supreme Court thirty years before *National League of Cities* in *New York v. United States*,[26] which involved Congress's power to tax. Chief Justice Stone's opinion in *New York* was relied upon by the majority in *National League of Cities*. In contrast, Justice Brennan's *National League of Cities* dissent declared *New York* distinguishable as a "tax immunity" case, and thus inapposite where the issue was immunity from federal regulation. The apposite decision from the same Term, according to Brennan, was *Case v. Bowles*,[27] in which the Court upheld the application to a state of wartime price controls.

Case and a companion case, *Hulbert v. Twin Falls County*,[28] must indeed be considered along with *New York* to provide an accurate picture of the Supreme Court's state-immunity thinking in 1946. Brennan was not the first to argue that the reconciling principle might be that state immunity is confined to federal taxation.[29] There is no more reason, however, to confine this principle to federal taxation than there is to confine to taxation the principle of the necessary and proper clause, or the principle that federal power over an enumerated subject matter may be exerted to influence extraneous ones. *All* of these are generic principles, applicable to the gamut of federal power. If the state immunity principle were to be isolated at all, it should be confined to those instances where it has a textual basis, as it does in the necessary and proper clause. But the Court's application of the principle to federal taxation is in fact an acknowledgement that it is a generic principle. If it applies to federal taxation, despite the lack of any textual basis, then its application in cases like *National League of Cities*, where it has a textual basis, seems to be *a fortiori*. One is impelled, therefore, to seek some better reconciliation of the 1946 cases.

When the several opinions in *New York v. United States* are examined, and compared with the opinions in *Case* and *Hulbert*, it appears that most of the eight participating justices supported a

26. 326 U.S. 572 (1946).

27. 327 U.S. 92 (1946).

28. 327 U.S. 103 (1946).

29. See, e.g., Justice Stone's dicta in United States v. California, 297 U.S. 175, 185 (1936), branded "simply wrong" by the majority in *National League of Cities*, 426 U.S. at 855.

principle of state immunity fundamentally like that applied in *National League of Cities*. All eight agreed that precedent required upholding the federal tax as applied to New York's sale of mineral waters. Two justices (Douglas and Black) maintained that those precedents should be overruled, and that all state activity and state property should be held immune from federal taxes.[30] (One of those, Douglas, dissented also in *Case* and in *Hulbert*, as he did twenty-two years later in *Maryland v. Wirtz*[31]—in each case expressing state immunity views consistent with the later decision in *National League of Cities*.) The other six were unwilling to overrule the precedents, but they all thought the existing rule needed refinement. Their attempts to articulate a test suggest the outlines of a sensible state immunity principle.

The precedents of that day were the product of case-by-case contraction of the extravagant tax immunity doctrine developed in the late nineteenth century, adjusting it to the newly expanded involvement of the states in business-like ventures.[32] In *South Carolina v. United States*, for example, the Court had declared that "the exemption of state agencies and instrumentalities from National taxation is limited to those which are of a strictly governmental character, and does not extend to those which are used by the State in the carrying on of an ordinary private business." The Court in that case had noted the analogy between this revised doctrine of tax immunity and the governmental/proprietary dichotomy developed to determine the tort liability of municipal corporations.[33]

In his opinion, joined by Justice Rutledge, Justice Frankfurter reviewed and discarded as untenable several such verbal dichotomies: governmental versus proprietary, governmental versus trading, historically sanctioned versus novel, and usual-governmental-functions versus activities-conducted-merely-for-profit. Frankfurter found it sufficient for disposing of the case then before him to apply a nondiscrimination rule: Congress could not tax state activities while leaving untaxed the same activities pursued by private individuals, but could "include the States in levying a tax exacted equally from private persons upon the same subject matter."[34]

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30. 326 U.S. at 590-98 (dissenting opinion).

31. 392 U.S. 183, 201 et seq. (1968) (dissenting opinion).

32. *See* Powell, *The Waning of Intergovernmental Tax Immunities*, 58 HARV. L. REV. 633 (1945).

33. 199 U.S. 437, 461-63 (1905).

34. 326 U.S. at 575-76, 584. Rutledge, while joining in Frankfurter's opinion, confided separately that he would support a rule of statutory construction requiring an explicit

Chief Justice Stone, whose opinion was joined by Justices Reed, Murphy, and Burton, was no less dissatisfied with the verbal formulations employed by the precedents. These justices, however, found unacceptable Frankfurter's rule that would allow any nondiscriminatory federal tax. The reason a mere nondiscrimination rule is insufficient, they argued, "is that a Federal tax which is not discriminatory as to the subject matter may nevertheless so affect the State, merely because it is a State that is being taxed, as to interfere unduly with the State's performance of its sovereign functions of government."[35] Although Justice Frankfurter primarily relied upon the antidiscrimination rule, he also expressly acknowledged a rule of immunity of "the State as a State," *apart from* discrimination. He declared that

> there are, of course, State activities and State-owned property that partake of uniqueness from the point of view of inter-governmental relations. These inherently constitute a class by themselves. Only a State can own a Statehouse; only a State can get income by taxing. These could not be included for purposes of federal taxation in any abstract category of taxpayers without taxing the State as a State.[36]

Of course there is no private statehouse; but a statehouse is real property. By foreclosing the inclusion of this property in any "abstract category," Frankfurter must be understood to preclude not only a federal tax upon statehouses *eo nomine*, but also the application to statehouses of a nondiscriminatory federal tax upon real property of whatever kind.

All six of the majority justices in *New York v. United States*, therefore, agreed that some principle of immunity insulates "the state as a state."[37] Of the two dissenters, Douglas at least supported the same view as to regulations as well as to taxes.[38] All eight rejected the verbal dichotomies attempted in earlier cases. The difference among the six in the majority was only that Frankfurter, while admitting the principle, declined to make as elaborate an attempt at new illumination.

Once the verbal dichotomies of the earlier cases are repudiated, it is difficult to conceive of any simpler way than Stone's of stating the state immunity principle. Stone's opinion refers repeatedly to the concept of "undue interference," "undue infringement," or "undue impairment." Frankfurter expressed discomfort

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declaration to that effect from Congress before a generally applicable tax could be applied to a state. *Id.* at 585.

35. *Id.* at 587.

36. *Id.* at 582.

37. 326 U.S. at 582.

38. See the dissents of Douglas in *Case* and *Hulbert*, 327 U.S. at 105, and in Maryland v. Wirtz, 392 U.S. 183, 201 (1968).

with this approach, which he thought "brings fiscal and political factors into play," entailing "issues that do not lend themselves to judgment by criteria and methods of reasoning that are within the professional training and special competence of judges."[39] But the sort of judgment Stone called for does not differ from that commonly made on other constitutional questions, regarding "undue burdens" upon interstate commerce, or equal protection constraints on legislation. Even Frankfurter's antidiscrimination rule did not avoid the necessity for case-by-case judgment; for as he acknowledged, " 'discrimination' is not a code of specifics but a continuous process of application."[40] As Stone observed of his "undue interference" concept, "[t]he problem is not one to be solved by a formula, but we may look to the structure of the Constitution as our guide to decision."[41]

While the opinion in *Case v. Bowles* did re-emphasize the sterility of the verbal dichotomies of the older cases, it did not repudiate *New York*'s endorsement of immunity for the "state as a state." Out of context, some of the language at the end of the *Case* opinion, because it is written in Justice Black's inimitable absolutist style, could be read as flatly repudiating any possible state immunity limitation on the necessary and proper clause.[42] Perhaps Black and even one or two of the others did conceive of the state immunity principle as limited to federal taxes. But there is also language in *Case* immediately preceding Black's absolutist phrases, reflecting the judgment required by Stone's concept of "undue interference." This language stresses the urgent war purpose behind the federal price control legislation, and points out that an exemption for the states "would impair a prime purpose of the Federal government's establishment."[43]

The "state as a state" formulation employed by all six of the majority justices in *New York* can be faulted only for its omission of a further refinement: an explanation of the sense in which the term "state" is being used. Amici in the *New York* case had argued that "both the state and the Federal governments are sovereign in their spheres."[44] Unfortunately, even Chief Justice Stone's opinion gave unwarranted countenance to this "dual federalism" view. He spoke of taxes that might "interfere unduly with the State's performance of its sovereign functions of government," of

39. 326 U.S. at 581.
40. *Id.* at 583.
41. *Id.* at 589.
42. That Black was contemplating the necessary and proper clause is evident from his citation to *McCulloch*. 327 U.S. at 102.
43. 327 U.S. at 102.
44. 90 L. Ed. at 328.

taxes impermissible "because a sovereign government is the taxpayer," and of taxes unduly infringing "the performance of its functions as a government which the Constitution recognizes as sovereign."[45] The Constitution, however, does not recognize the states' governments as sovereign; its postulate is that the people are sovereign, and as such—arrayed in their respective "political communities"—entitled to self-government. One might wish that Chief Justice Stone had studied the distinction drawn by his predecessor Chase in *Texas v. White* before writing his opinion in *New York*.

In this respect, Justice Rehnquist's opinion in *National League of Cities* is only somewhat less to be faulted. On the one hand, Rehnquist did take care to make the point that state immunity does not preserve any realms of citizen behavior exclusively for state control.[46] On the other hand, even in the same passage, Rehnquist spoke of "the dual sovereignty of the *government* of the Nation and of the State," and referred to "attributes of sovereignty attaching to every state *government*."[47] Elsewhere, he referred to "the States in their capacities as sovereign governments."[48]

It is not surprising that Rehnquist's opinion was misunderstood by so many as reviving "dual federalism" thought. For the same reason, it was most appropriate for Justice Blackmun to separately express his correct understanding of the Court's opinion. If Rehnquist's expressions are taken in context, however, it seems clear enough that *National League of Cities* protects, not any purported sovereign rights of state governments as such, but rather the integrity of state political communities, and their right to maintain institutions capable of serving their needs without undue interference from the national institutions. The more apt expressions are found in those passages of Rehnquist's opinion protesting "forced relinquishment of important governmental activities" that those political communities expect to be performed, and objecting to "congressionally imposed displacement" of state decisions and policies regarding the delivery of services. In this sense, administration of the law and the providing of other public services can be considered "integral governmental functions" of the states—not as species of power reserved to the states as sovereign governments, but rather as functions that the indestructible political communities called "states" are entitled to have

45. 326 U.S. at 587-88.
46. 426 U.S. at 845.
47. *Id.* at 844-45 (emphasis added).
48. *Id.* at 852.

performed by their peculiar institutions without "undue" interference. It is in this sense, as a separate "political community," that a state is "a coordinate element in the system established by the Framers," and not merely a factor in the "shifting economic arrangements" within the nation.[49]

It was no absolute or wooden rule of immunity that *National League of Cities* endorsed. Blackmun was correct in understanding the Court's opinion (which he joined) as adopting a balancing approach.[50] The principle is not so inflexible as to foreclose application to the states of all federal regulations. As Justice Douglas put it, presaging *National League of Cities* in his *Maryland v. Wirtz* dissent, application of the state immunity principle "depends on the facts."[51] A carefully considered case-by-case judgment must be made, properly based in part on "the degree of intrusion upon the protected area of state ["political community"] sovereignty."[52] The lesser degree and temporariness of the intrusion was one point distinguishing the wage freeze upheld in *Fry v. United States.* The judgment is also properly based on the urgency of the federal purpose, another factor in *Fry.* Considering these factors, the wage freeze challenged in *Fry* was judged not to "impair[] the States' integrity or their ability to function effectively in a federal system."[53] A like judgment might very well be made, as Justice Blackmun suggested in dictum, with regard to environmental protection.[54]

In *National League of Cities*, as contrasted with *Fry*, the majority's considered judgment was that in the absence of any comparable urgency, such displacement of "the States' freedom to structure integral operations in areas of traditional governmental functions" did not "comport with the federal system of government embodied in the Constitution."[55] The same point made long ago by Hamilton was reiterated by Rehnquist in *National League of Cities*: The degree or clarity of the relation sufficient under the necessary and proper clause to support a measure as applied to private entities is not necessarily sufficient to support it as applied, "not to private citizens, but to the States as States."[56] Chief Justice Stone had contemplated a similar sort of judgment when he

49. *Id.* at 847, 849, 851, 855.
50. *Id.* at 856.
51. 392 U.S. at 205.
52. *National League of Cities*, 426 U.S. at 852.
53. *Fry*, 421 U.S. 542, 547 n.7 (1975); *see* 426 U.S. at 852-53, 856.
54. 426 U.S. at 856.
55. *Id.* at 852.
56. 426 U.S. at 845.

spoke of federal interference or infringement which might be considered "undue."

Justice Brennan, dissenting in *National League of Cities*, insisted that the judiciary has no business making such judgments at all:

> It is unacceptable that the judicial process should be thought superior to the political process in this area [citing *Wickard v. Filburn*[57]]. . . .
>
> Judicial restraint in this area merely recognizes that the political branches of our Government are structured to protect the interests of the States, as well as the Nation as a whole, and that the States are fully able to protect their own interests in the premises. . . . [Judicial involvement in this area] violates the fundamental tenet of our federalism that the extent of federal intervention into the States' affairs . . . shall be determined by the States' exercise of political power through their representatives in Congress. See Wechsler, The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government, 54 Col. L. Rev. 543 (1954).[58]

Brennan's adamant assertion was wrong on two grounds.

First, his reliance upon *Wickard v. Filburn* was misplaced. Certainly, effective restraints on Congress's policy for interstate commerce must be political rather than judicial, as said by the *Wickard* Court. What was at issue in *Wickard*, however, was not interstate commerce but rather the validity, under the necessary and proper clause, of federal acreage allotments for production as a means to the Congressional policy about prices of grain sold in interstate commerce. The Court in *Wickard* distinguished the issues, said it was applying the necessary and proper clause,[59] and carefully tested the production control measure under that clause. The necessary and proper clause does allow great latitude to Congress in the choice of means, but the latitude is bounded by the clause's terms, which the judiciary must independently apply. As to Congress's policy for what the judiciary agrees to be interstate commerce, restraints on policy are to be sought in the political process, but as to controls on production as a means to effectuate that policy, the judiciary must be satisfied that the means are both necessary and proper to the commerce clause end.

Second, Brennan's reliance upon Professor Wechsler's article was misplaced. Wechsler's observations were published a generation ago in 1954, and however cogent they might have been then, they are plainly anachronistic now. When Wechsler wrote, it was still accurate to call national action "exceptional," "fragmentary," and "ad hoc."[60] By the early 1970's, a new outpouring of social

57. 317 U.S. 111, 120 (1942).
58. 426 U.S. at 876-77.
59. 317 U.S. at 119 & n.15, 121, 125.
60. Wechsler, *The Political Safeguards of Federalism: The Role of the States in the*

legislation from Congress, unanticipated when Wechsler wrote, had created over a thousand categorical grant programs involving billions of dollars, radically warping operations of the states. Today Congress interests itself in everything from the training of medical technicians and the housing of cats and dogs held for medical experiments, to disclosure of consumer credit terms, local law enforcement records, local possession of firearms by convicted felons, and health hazards from asbestos insulation in public schools.[61] While it remains generally true that "Congress acts . . . against the background of the total *corpus juris* of the states," it seems there is no longer "a burden of persuasion on those favoring national intervention."[62] On the contrary, the presumption on which Congress now operates seems to be that virtually every significant grievance of their constituency warrants a federal remedy.

Wechsler also relied heavily upon the states' "crucial role in the selection and the composition of the national authority," particularly Congress. As to the House, Wechsler relied on the states' "control of voters' qualifications, on the one hand, and of districting, on the other." Today, reapportionment litigation and voting rights legislation have changed the basic rules of politics. One significant illustration of state control over composition of the electorate, according to Wechsler, was the poll tax. He thought legislation to abolish the tax had "no real prospect,"[63] but ten years later the twenty-fourth amendment was adopted. Subsequently, the minimum voting age was lowered by federal legislation, upheld as valid with respect to the election of representatives and other federal officials[64] even before the twenty-sixth amendment. Today, states have nothing like the role in shaping the electorate for representatives that they had in 1954.

Even the Senate today does not function, as Wechsler perceived in a different day, "as the guardian of state interests as such."[65] Too great a departure from the policy prescriptions of their national political parties or other national interest groups can cost senators crucial endorsements, volunteer assistance, and financial support. Corporate enterprise and organized labor are

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Composition and Selection of the National Government, 54 COLUM. L. REV. 543, 544, 545 (1954).

61. For the relevant statutes, see 7 U.S.C. 2131, 15 U.S.C. 1601, 18 U.S.C. 1201, 20 U.S.C. 3601, 42 U.S.C. 10001, 26 U.S.C. 5801, 5812. *See generally* Conyers, *The Politics of Revenue Sharing*, 52 J. URBAN L. 61, 76-77 (1974); Gribbs, *The New Federalism Is Here To Stay*, *id.* at 55, 56-57.

62. Wechsler, *supra* note 60, at 545.

63. For the quoted passages, see *id.* at 546, 548, 549. *See generally id.* at 548-52.

64. Oregon v. Mitchell, 400 U.S. 112 (1970).

65. Wechsler, *supra* note 60, at 548. *See generally id.* at 547-48.

better represented in Congress today than any single state or even the collective interests of "the states as states." So are a host of other interest groups with persuasive lobbyists and large campaign funds. The states—those political communities that the Constitution contemplates as the building blocks of the Union—are today in no sense the constituency of any elected national official. Wechsler's hypothesis of state dominance in the national legislative process, ventured thirty years ago, today is little more than a fairy tale.

III

Application of the state immunity principle necessarily calls for judgment. The trustworthiness of judgment, however, depends greatly on the clarity with which an issue is perceived. Judicial analysis in the post-*National League of Cities* era has been hampered by the "three-pronged test" articulated in the *Hodel* case.[66] The first prong of that "test" wholly omits to elucidate what sense of the term "state" is being used. The second prong, drawn from a sentence in *National League of Cities* that refers to "attributes of sovereignty attaching to every state government," actually misdirects the inquiry, focusing attention upon government powers rather than upon the interests of the political communities, and thus inviting repetition of the dual federalism error. The third prong exhumes one of the unhelpful dichotomies rightly buried in *New York* by referring to "traditional governmental functions." In short, the "three-pronged test" serves to solidify the worst shortcomings of the *National League of Cities* opinion. What should be the crucial inquiry is alluded to in *Hodel* only in a footnote: whether the states' integrity as viable "political communities" is "unduly" infringed by application of the federal measure involved.[67]

Every state immunity case thus far adjudicated by the Supreme Court since *National League of Cities* has involved—as did *National League of Cities* itself—federal regulatory schemes based upon the necessary and proper clause, designed to effectuate federal policy with regard to the enumerated subject matter of interstate commerce. Repeatedly, however, the analysis at least by several of the justices has been crippled by the commonplace failure to distinguish between the commerce clause and the necessary and proper clause. In the *Hodel* cases, there was good ground to

66. Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 287-88 (1981).

67. 452 U.S. at 288 n.29.

question the necessary and proper clause basis for several provisions of the law in question, wholly apart from any state immunity contention.[68] But assuming no such defect, it is clear that no state immunity objection could be sustained; only an immunity argument confounding the states, as political communities, with the power over citizens that might be exercised by their governments could be made, thus reviving the "dual federalism" error.

The unanimous opinion in *United Transportation Union v. Long Island Rail Road Company*[69] was written by Chief Justice Burger, a member of the *National League of Cities* majority. His opinion reflects somewhat greater awareness that the federal law there in question, the Railway Labor Act, rests on the necessary and proper clause and not on the commerce clause *per se*.[70] Nevertheless, the opinion is skewed by the use of the three-pronged test.[71] *UTU* was actually an easy case. The state had acquired the railroad with full awareness that it operated under a longstanding, comprehensive scheme of federal regulation, and had acquiesced in that regulatory scheme for some thirteen years. Certainly, any purported interference with the state government's preferred approach to labor relations could not be considered "undue."

FERC v. Mississippi[72] was a much closer case. Here, the majority's failure to distinguish between the commerce clause and the necessary and proper clause had a very serious effect. The lower court and the state had relied upon the hopeless contention that Congress has no power to govern electric utilities because their activities are not interstate commerce. Of course Congress can

68. None of the justices, however, surmounted the confusion engendered by the "affecting interstate commerce" idiom sufficiently to rediscover the now long-obscured "particularity" requirement of the necessary and proper clause. Justice Rehnquist and Chief Justice Burger lamented the purported "fiction" of the doctrine that Congress exercises only the power delegated to it; but although they were obviously deeply disturbed at not finding a better ground for doubt, they did no more than emphasize the "substantiality" requirement of the traditional necessary and proper clause construction. It did not occur to them to emphasize that the clause only supports *particular* regulations of extraneous matters, and only *insofar as* those particular regulations are rationally found to substantially conduce to some interstate commerce policy end. Some of the multitudinous provisions of the Surface Mining Act satisfy this particularity requirement; but others seem to fail. What policy for interstate commerce, for example, can be promoted by prohibiting surface mining close to churches and schools? The congressional history of the Surface Mining Act does not show a particularized consideration of need for each of the numerous controls imposed; all it shows is that surface mining affects interstate commerce in a variety of ways, as if that could make every facet of the enterprise, without any more particularized inquiry, amenable to federal control. The necessary and proper clause justifies no such thing.

69. 455 U.S. 678 (1982).

70. *See id.* at 688.

71. Thus he found it necessary to disavow "a static historical view," *id.* at 686, and to erect as a counterweight the notion of "areas traditionally subject to federal statutory regulation," *id.* at 687.

72. 456 U.S. 742 (1982).

regulate them in a multitude of ways, even as to activities that are not interstate commerce, by virtue of the necessary and proper clause. The majority, however, discussed it as a "commerce clause" case. Compounding this error, the majority relied on an *ipse dixit* from *Hodel*: "It is established beyond peradventure that 'legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality.' "[73] The cases cited in support of this proposition involved only purported *due process* constraints on economic regulations. Under the necessary and proper clause, however, the maximum allowable "presumption of constitutionality" is that long ago articulated by Hamilton: "strong presumption in favor of its constitutionality" under that clause may be indulged *only* if it *does not* "abridge a pre-existing right of any State [in the sense of a "political community"] or of any individual." This makes the immunity question integral to "propriety" under that clause. The merger of the commerce clause and necessary and proper clause issues worked mischief in the *FERC* Court's analysis, for it applied the so-called "tenth amendment" standard of *National League of Cities* only after it had first satisfied itself that the regulations involved were within Congress' power under the commerce clause. Instead of treating it correctly as integral to the necessary and proper clause inquiry, therefore, the majority treated the state immunity issue as an afterthought.

What was unique about the legislation challenged in *FERC v. Mississippi* was its attempt "to use state regulatory machinery to advance federal goals." To an extent, this "presents an issue of first impression."[74] Somewhat comparable regulations had been conceded by the government to be unconstitutional just a year after *National League of Cities*,[75] but Congress had since grown more bold.

There was no dissent from that part of the *FERC* opinion upholding federal authority to encourage cogeneration and small power production facilities and to exempt such facilities from state regulation. And no wonder, because those provisions were merely valid "necessary and proper" governance of the production activities of utilities for commerce clause policy ends, intruding not at all on the integrity of the states. Four justices, however, dissented from upholding provisions that prescribed administrative and ju-

73. 452 U.S. at 323; 456 U.S. at 754.

74. *Id.* at 759.

75. *See* EPA v. Brown, 431 U.S. 99 (1977).

dicial procedures to be followed by state regulatory institutions.[76] The majority thought it sufficient to uphold these provisions that Congress could have preempted entirely the state's role in electric utility regulation. Concededly, Congress could have done so, but the fact is that it did not. Instead it demanded state compliance with the prescribed procedures, and did not even establish a backup federal machinery to which the regulatory function could default if a state should elect the option posited by the majority of "abandoning regulation of the field altogether."[77] The dissenters perceived this as equivalent to superseding "state-court rules of civil procedure and judicial review" in cases over which federal tribunals could have been given exclusive jurisdiction.[78] They decried the statute as an attempt to "conscript state utility commissions into the national bureaucratic army,"[79] on a theory that "could reduce the States to federal provinces."[80] Their concern may have been somewhat exaggerated, since the prescribed procedures were not shown in that case to "expand[] on [Mississippi's] existing, liberal approach to public participation in ratemaking."[81]

Three justices[82] also dissented from upholding the requirement that state regulatory commissions "consider" a federally suggested set of standards relating to the terms and conditions of electricity service.[83] The majority upheld these provisions primarily by analogy to *Testa v. Katt*.[84] There is no doubt that the "dual federalism" based holding of *Kentucky v. Dennison*,[85] relied upon by Mississippi, was wrong and should be flatly overruled—as much as that in *Carter Coal*, upon which Mississippi also relied. But the analogy to *Testa v. Katt* does not hold. There, state institutions were not enlisted to do the federal government's bidding; the Court merely enforced the supremacy of valid federal law where applicable to cases within the state courts' *state-prescribed* jurisdiction and procedures. Dictating the agendas of state institutions erected by political communities to perform functions for their own welfare at least verges upon being an "undue" interference with the states' integrity, and risks reducing their institutions to "field offices of the national bureaucracy" or "think tanks to

76. *See* Powell's dissent, 456 U.S. at 771, and O'Connor's dissent, joined by Burger and Rehnquist, *id.* at 775.
77. 456 U.S. at 766.
78. *Id.* at 774 (Powell, J., dissenting).
79. *Id.* at 775 (O'Connor, J., dissenting).
80. *Id.* at 773 (Powell, J., dissenting).
81. *Id.* at 769.
82. O'Connor, joined by Burger and Rehnquist. *Id.* at 775.
83. *Id.* at 747-48.
84. 330 U.S. 386 (1947).
85. 65 U.S. (24 How.) 66 (1861).

which Congress may assign problems for extended study."[86]

Nonetheless, whether these provisions constitute "undue" interference with "the states as states" is properly a matter of judgment; and on matters of judgment, judicial minds must be expected to differ. Only about half of the current justices, however, seem to have any grasp of the sensible state immunity principle and the questions for judgment that it frames.[87] Among the *FERC* majority were some justices who adamantly insist that no judicial judgment on the critical issues should even be made; one can be confident only as to Justice Blackmun that any judgment on the material issues, whether sound or unsound, was even attempted.

The latest state immunity decision is *EEOC v. Wyoming*.[88] That case involved the 1974 extension of the Age Discrimination in Employment Act (ADEA) to cover employees of state and local governments.[89] Justice Brennan, the prime dissenter in *National League of Cities*, wrote for the majority, and again confused the commerce clause and the necessary and proper clause. Although he employed the unhelpful "three-pronged test" formulated by his fellow *National League of Cities* opponent, Marshall, in *Hodel*, his opinion does contain one redeeming perception. He acknowledged that "[t]he principle of immunity articulated in *National League of Cities* is a functional doctrine . . . whose ultimate purpose is . . . to ensure that the unique benefits of a federal system . . . not be lost through *undue* federal interference. . . ." "We conclude," he wrote, "that the *degree* of federal intrusion in this case is sufficiently less serious than it was in *National League of Cities* so as to make it unnecessary for us to override Congress's express choice to extend its regulatory authority to the States." Brennan might be faulted for his assertion that the inquiry called for is "essentially legal rather than factual";[90] for one might well argue that the difference in outcome between *Maryland v. Wirtz* and *National League of Cities* is attributable at least in part to the far more extensive detailing of the purported factual impact in

86. 456 U.S. at 777 (O'Connor, J., dissenting).

87. Some seem opposed to performing this essential judicial role at all; see, e.g., the dissent of Justice Stevens from the grant of leave to file an original complaint in South Carolina v. Regan, 52 U.S.L.W. 4232, 4245 (1984).

88. 103 S. Ct. 1054 (1983).

89. Here the nonsense resulting from failure to distinguish between commerce clause and necessary and proper clause issues was made most apparent in Justice Stevens' concurring opinion, *id.* at 1064, which was fittingly answered by Justice Powell's supplemental dissent, joined by Justice O'Connor, *id.* at 1075.

90. *See id.* at 1060 (emphasis added), 1062 (emphasis added), 1063. Again, "[n]othing in this case . . . portends anything like the same wide-ranging and profound threat to the structure of State governance." *Id.* at 1062.

National League of Cities. Beyond that, one might simply disagree (as did the dissenters) with the judgment that Brennan made on the question of degree.

The principal dissent was written by Chief Justice Burger, and joined by Justices Powell, Rehnquist, and O'Connor. Burger applied the "three-pronged test" and then passed to the "balancing" judgment that really is the heart of the principle. But the dissent was weakened by failure to distinguish sharply between the commerce and necessary and proper clauses. The significant fact that Congress, in the ADEA, "has not placed similar limits on itself" could have been made much more forceful. As Hamilton explained, the necessary and proper clause requires more urgent "legitimate" (e.g., interstate commerce policy) objectives and a clearer telic relation when the federal measure "abridge[s] a pre-existing right of any State," in the sense of a political community—such as the right of those communities to expect of their own local governments the most effective possible law enforcement and fire protection. That Congress had explicitly excluded federal law enforcement personnel belies any assertion that coverage of similar state officials was clearly and closely related to any urgent federal purpose.[91]

The ADEA has been upheld by some lower federal courts under the enforcement clause of the fourteenth amendment.[92] The *EEOC* Court specifically declined to decide whether the enforcement clause applied;[93] but the dissenting justices discussed the point and it deserves discussion here. Congress's power to enforce, "by appropriate legislation," the post-Civil War amendments, is very substantial and very important. Unfortunately, it also has been very much misunderstood.

The dissenting opinion in *EEOC* gave the enforcement clause a construction that in one respect is too narrow. It is not quite true that "Congress may act only where a violation lurks"[94]—at least if this means that a constitutional violation must already have occurred. Congress's power extends to prophylaxis against violations that otherwise might occur, whether or not they actually have occurred.[95] Thus Congress could have acted to prevent age discrimination by states, even if only as a safeguard against possi-

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91. *See* 103 S. Ct. at 1070.

92. *See, e.g.*, Arritt v. Grisell, 567 F.2d 1267 (4th Cir. 1977); Carpenter v. Pennsylvania Liquor Control Bd., 508 F. Supp. 148 (E.D. Pa. 1981); EEOC v. Pennsylvania Liquor Control Bd., 503 F. Supp. 1051 (M.D. Pa. 1980); Marshall v. Delaware River & Bay Authority, 471 F. Supp. 886 (D. Del. 1979).

93. 103 S. Ct. at 1064.

94. *Id.* at 1072-73.

95. That was the point of the *first* rationale employed in the Court's opinion in Kat-

ble discrimination that had nowhere yet actually occurred, *if* age discrimination were prohibited by the equal protection clause. The "if," however, is crucial.[96]

As the Court repeatedly has noted, the enforcement clauses are analogous to the necessary and proper clause. This analogy necessitates application of the state immunity principle under the enforcement clauses. The adjective "appropriate," used in the enforcement clauses, subsumes *both* the concept of "necessary" (in the generous Hamiltonian sense) and the concept of "proper" (also as illuminated by Hamilton and Chief Justice Marshall). Here again, in other words, there is a textual-basis for application of the state immunity principle.[97]

This principle, however, operates somewhat differently with respect to the enforcement clauses, because the substantive provisions of most of the amendments containing enforcement clauses are themselves constraints upon the "states." It is "states," for example, that are ordered not to "deny . . . the equal protection of the laws," or to deny or abridge voting rights on account of race. It might persuasively be argued that these prohibitions apply not only to state governments but to the states themselves as political communities. Indeed, that seems to have been the understanding of the Congress that drafted the fourteenth amendment. Virtually contemporaneous statutes prescribe both criminal penalties and civil remedies with regard to violations of these constitutional rights whether accomplished under color of law, or merely by vir-

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zenbach v. Morgan, 384 U.S. 641, 650-53 (1966); and there was nothing novel about the proposition even at that time.

96. The *second* rationale articulated by Justice Brennan in his opinion for the Court in Katzenbach v. Morgan, 384 U.S. at 653-54, was erroneous for overlooking this point. Fifteen years ago this portentious *second* rationale had constitutional academia all agog, as it suggested congressional rather than judicial authority over the scope of constitutional rights. Among other things, it was the purported basis on which legislation to lower the voting age was enacted. *See* Engdahl, *Constitutionality of the Voting Age Statute*, 39 GEO. WASH. L. REV. 1, 2-3 (1970). When that legislation was tested in Oregon v. Mitchell, 400 U.S. 112 (1970), the justices recognized that this *second* rationale is really an avulsion of the judiciary's prerogative of independent constitutional construction; and not one of the justices applied it (although Brennan did advance a slightly more credible variation, 400 U.S. at 229). Since *Oregon* the Supreme Court has given no credence to the notion that Congress can define the substance of constitutional rights.

97. The dissenters in *Wyoming* failed to make the point in this way, and instead argued much less persuasively that the tenth amendment "was not, after all repealed when the fourteenth amendment was ratified: it was merely limited" so that Congress does not have "a 'blank check' to intrude into details of states' governments at will" in acting under the enforcement clause. 103 S. Ct. at 1072. This is unpersuasive because, as already noted, the tenth amendment says nothing whatever that can be construed as *delimiting* or *restricting* any delegated federal power, unless the "dual federalism" error is resurrected. It is the language of the enforcement clauses themselves, and not the tenth amendment, that invokes the state immunity principle.

tue of "custom" or "usage."[98] Moreover, a "denial" may be accomplished as much by failing (for whatever reason) to afford the protection required, as by affirmatively taking it away; a supplicant is as much "denied" the bread he seeks when it is merely withheld from him, as when it is snatched from his hands. This, too, seems to have been the original intent.[99] Resort to attenuated theories of "state action," in the sense of governmental involvement, might be considerably lessened if more careful thought were given to the sense in which the term "state" is used in these amendments. Even greater latitude for congressional enforcement might be appropriate on the view suggested here.

In any event, the enforcement clauses do require a judgment as to "appropriateness." If that judgment is analogous to that required under the necessary and proper clause, it must include inquiry not only into whether the enforcement measure seems rationally adapted to effectuate the legitimate end, but also into whether it "unduly" infringes the integrity of the state as an indestructible political community. What degree of infringement is "appropriate," and at what point the infringement might become "undue," might well be judged differently where the congressional objective is to ensure individual rights. But there *is* a judgment of constitutional dimension to be made.

The state immunity principle is applicable, for example, in determining the appropriate remedy for a civil rights violation. Even though a state's fiscal resources are not insulated from invasion to remedy civil rights violations,[100] monetary relief should be

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98. Civil Rights Act of 1866, sec. 2, as amended, 18 U.S.C. sec. 242; Ku Klux Klan Act of 1871, sec. 1, as amended, 42 U.S.C. sec. 1983.

99. Section 3 of the Ku Klux Klan Act of 1871 provided that when "the constituted authorities" of a state, in the face of private combinations or violence, "shall either be *unable* to protect, *or* shall, from any cause, *fail* in or refuse protection of the people in" any of the rights, privileges, or immunities secured by the Constitution, "such facts shall be *deemed a denial* by such State of the equal protection of the laws to which they are entitled under the Constitution" (emphasis added). The Enforcement Act of 1870, secs. 2 & 3, also imposed obligations of affirmative action upon state officials.

100. A state cannot claim immunity *from suit* in a federal forum for purported violations of constitutional rights. Fitzpatrick v. Bitzer, 427 U.S. 445 (1976). But amenability to suit has nothing to do with the state immunity principle here under discussion. Notwithstanding Justice Marshall's assertion to the contrary in his majority opinion in Rome v. United States, 446 U.S. 156, 179 (1980), *Fitzpatrick* was no answer to the question reserved four days earlier by a footnote in *National League of Cities*, 426 U.S. at 852 n.17, as to whether state immunity could apply in the context of the enforcement power. Immunity from suit is a totally different question, turning on completely different premises. The judicially contrived state immunity *from suit* by its own citizens, Hans v. Louisiana, 134 U.S. 1 (1890), falsely attributed to the eleventh amendment, certainly should be abrogated. *See* Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COL. L. REV. 1889 (1983); Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. COLO. L. REV. 1, 28-32 (1972). Even if it were, however, the independently

judiciously tempered by consideration for the interests of the state political community as a whole. There are suggestions to this effect in *Pennhurst State School & Hospital v. Halderman.*[101]

A graphic illustration is provided by another case, which seems likely within the next few years to reach the Supreme Court's docket. In 1982, having exhausted their administrative remedies, two unions and several individuals brought a class action against the State of Washington and some of its agencies in a federal district court, alleging sex discrimination in the state's wage systems for classified employees. They relied upon a "comparable worth" interpretation of Title VII, which as amended in 1972 prohibits discrimination by states as well as other employers on the basis of race, color, religion, sex, or national origin. On December 14, 1983, the district court ruled in favor of the plaintiffs, ordering sweeping prospective relief and also awarding "back pay" to members of the represented class.[102] An appeal is now pending in the Ninth Circuit.

For present purposes, it may be assumed that the "comparable worth" construction of Title VII is valid, and that the order for *prospective* monetary relief (approximately $130 million per year) can stand. The "back pay" awarded, however, totals just short of $561 million. The State of Washington operates on a biennial budget of approximately $8 billion; but nearly half of this sum goes to fund basic education, and another twenty-five percent is required to fund pensions and other social and health services. The remaining $1 billion per year funds all other government operations and services, including higher education. Washington's state constitution prohibits deficit spending, prohibits raising property taxes above a certain level, and prohibits imposition of an income tax. Public initiatives have eliminated inheritance taxes and the sales tax as applied to food. The state's primary revenue sources are sales taxes and business and occupation taxes; recent shortfalls in the revenues from these sources prompted the

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derived principle of state immunity here under discussion would nonetheless remain for judicial application.

101. 451 U.S. 1 (1981). *Pennhurst* was decided a year after Maine v. Thiboutot, 448 U.S. 1 (1980), had held that 42 U.S.C. sec. 1983 gives a cause of action to enforce statutory as well as constitutional rights. While the *Halderman* majority found it unnecessary to determine whether *Thiboutot* applied, one of the reasons it gave for declining to do so was the problem of scope of remedy that then would arise. 451 U.S. at 29-30. Still more significant, the partial dissent in *Halderman*, which *did* declare *Thiboutot* applicable, suggested substantial restraint with regard to the remedies that properly might be ordered—restraint that, in essence, reflects due consideration of the general interests of the defendant state "as a state." 451 U.S. at 51-55.

102. American Federation of St., Cty. & Mun. Emp. v. State of Washington, 578 F. Supp. 846 (W.D. Wash. 1983).

legislature to reduce the biennial budget by some $500 million, eliminating 3,000 state jobs. To generate the $561 million to satisfy the "back pay" award would require a twenty-two percent increase in the sales tax or a fifty-five percent surtax on business and occupation taxes. Washington already has the nation's highest state sales tax, a regressive tax that hits hardest those least able to pay, and the existing business surtax may well already threaten the vitality of the state's business economy. A small portion of the required sum might be generated by increases in miscellaneous fees and taxes, such as the gasoline tax and fees for driving and fishing licenses. As an alternative to raising taxes, the state could cut all state services (including social welfare programs and the prison system) approximately twenty percent across the board for the present biennium; or, it could eliminate all state funding for post-secondary education; or, it could eliminate all state funding for medical care and nursing homes. Merely eliminating the state's entire budget for welfare programs would fall more than $200 million short of producing the needed sum.

In the district court, the state's attorneys argued that the tenth amendment precluded the award of "back pay" relief, relying heavily upon *National League of Cities*. The district judge abruptly rejected this argument with the observation that Title VII enforces the fourteenth amendment. It would seem, however, that while the attorneys for Washington could well have framed their argument better, the judge's response was too facile. The impact of the back pay award seems far more drastic than the impacts postulated in *National League of Cities*. If protected rights were indeed violated, justice requires a suitable remedy, but the suitability of the remedy cannot be judged without regard for its impact upon the state. Unlike private entities, states cannot respond to such devastating financial impacts by going out of business or undergoing bankruptcy reorganization; they are indestructible components of the nation.

This point is essentially what divided the dissenters from the majority in *Rome v. United States*.[103] That Congress has power to enforce the fifteenth amendment, even by prophylactic means somewhat in excess of those necessary, is fully consistent with the necessary and proper clause analogy. One cannot justify judicial abdication, however, simply by reciting that the Civil War amendments "were specifically designed as an expansion of federal power and an intrusion on state sovereignty."[104] At how great a

103. 446 U.S. 156 (1980).
104. *Id.* at 179 (majority opinion).

price, in terms of the integrity of those political communities, the very worthy objectives of those amendments are to be attained remains a question of judgment, to be determined by the judiciary as particular cases are decided. Justice Powell was on solid ground in observing that: "[u]nless the federal structure provides some protection for a community's ordering of its own democratic procedures, the right of each community to determine its own course within the boundaries marked by the Constitution is at risk."[105] True, Justice Rehnquist's discussion of the "three theories of congressional enforcement power relevant" to *Rome*[106] was not quite accurate, his reading of the precedents was a bit too restrictive, and he was wrong in concluding that only Brennan's discredited "second rationale" in *Morgan* could sustain the result in that case. He was right, however, in observing that "[p]olitical theorists can readily differ on the advantages inherent in different governmental structures," and right in noting that our constitutional system is offended when "the only values fostered [by an intrusion upon the states] are debatable assumptions about political theory which should properly be left to the local democratic process."[107] If the decision in *Rome* upholding the Voting Rights Act as applied in that case had been based upon a majority judgment on the "appropriateness" of that application of the statute, then the dissents could be taken only as proof that judgments on that critical question can differ. It is evident from the majority opinion, however, that at least some of the justices refused to acknowledge that any such judgment must be made at all. That is a cardinal error, and the abdication of a judicial function as vital as any the courts have to perform.

In the necessary and proper and enforcement clauses, the principle of state immunity has clear textual basis. But the principle is a generic one. The majority in *National League of Cities* had declined to discuss its applicability, for example, "if Congress seeks to affect integral operations of state governments by exercising authority granted it under other sections of the Constitution such as the spending power, Art. I, sec. 8, cl. 1."[108] An occasion to consider the state immunity principle in the context of conditions on federal spending arose in 1976, when Congress amended the Federal Unemployment Tax Act to condition reimbursement for the expenses of maintaining unemployment compensation programs upon states' extension of unemployment benefits coverage

105. *Id.* at 201-02 (Powell, J., dissenting).
106. *Id.* at 210-12.
107. *Id.* at 219, 221.
108. 426 U.S. at 852 n.17.

to public employees. Projecting the impact upon state operations to be comparable to *National League of Cities*, six states and a multitude of subordinate governmental entities brought suit to invalidate the new condition on that ground.[109] Unfortunately their lawsuit, designed by the same lead counsel who had prevailed in *National League of Cities*, was cast as a challenge to the denial of federal unemployment tax credits to private employers in nonconforming states. This writer, retained as a consultant, urgently warned that this effort would founder on the Tax Anti-Injunction Act, and advised that it be voluntarily dismissed and succeeded by an original action in the Supreme Court challenging not the tax credit denial, but the conditioning of administration grants.[110] The writer's consulting services were then abruptly terminated; and the case did indeed founder on the Anti-Injunction Act.[111] That opportunity squandered, all but one of the states amended their laws to comply. The solitary holdout was New Hampshire, where a bill to accomplish conformity was vetoed. When the Secretary of Labor found New Hampshire out of conformity, it undertook litigation on its own. The First Circuit rejected its state immunity contention, misreading the *National League of Cities* footnote as confining the state immunity principle to the commerce clause.[112]

From this, some writers have overconfidently concluded that the state immunity principle does not apply to conditional federal spending schemes.[113] This conclusion overlooks a crucial footnote in *Pennhurst State School and Hospital v. Halderman*, which says, "[t]here are limits on the power of Congress to impose conditions on the States pursuant to its spending power, *Steward Machine Co. v. Davis*, 301 U.S., at 585; *Lau v. Nichols*, 414 U.S. 563, 569 (1974); *Fullilove v. Klutznic*, 448 U.S. 448 (1970) (Burger, C.J.); see

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109. Los Angeles County, et. al., v. Marshall, Civ. Action No. 77-2023 (D.D.C.). The plaintiff states were South Carolina, Alaska, Missouri, Nebraska, New Hampshire, and New Mexico. The full list of plaintiffs filled 169 pages of the 520-page complaint.

110. An original action in the Supreme Court is the procedure now appropriately being employed, for example, in South Carolina v. Regan, 52 U.S.L.W. 4232 (1984).

111. 442 F. Supp. 1186 (D.D.C. 1977), *aff'd*, 631 F.2d 767 (D.C. Cir. 1980), *cert. denied*, 449 U.S. 837 (1980).

112. New Hampshire Department of Employment Security v. Marshall, 616 F.2d 240 (1st Cir. 1980). There were *six* particulars in which New Hampshire was found out of conformity, and as to only one or two of those was the state immunity point germane; the result therefore would stand regardless of how the immunity point were decided. The case therefore was quite unsuited to New Hampshire's purpose of pursuing the state immunity issue, and it cannot be surprising that the Supreme Court denied certiorari. 449 U.S. 806 (1980).

113. *See, e.g.*, Schwartz, National League of Cities v. Usery *Revisited—Is the Quondam Constitutional Mountain Turning Out to be Only a Judicial Molehill?* 52 FORD. L. REV. 329, 343-46 (1983).

National League of Cities v. Usery, 426 U.S. 833 (1976)."[114] The "limits" thus alluded to are illumined by some of the cases cited in the footnote itself. Not all of them, however, are helpful. *Lau* and *Fullilove* merely indicate that *some sort* of limitation on Congress's power to promote extraneous ends by conditions attached to federal funding has consistently been presumed; they do not offer enlightenment as to what sort of limitation that might be.[115] Greater enlightenment is provided, however, by the passage from the *Steward Machine* opinion cited in the *Pennhurst* footnote. This passage contains Justice Cardozo's observation that the conditional grant program upheld in that case was "not void as involving the coercion of the States in contravention of the Tenth Amendment or of *restrictions implicit in our federal form of government*."[116] This passage is highly suggestive, particularly since it is coupled in the *Pennhurst* footnote with a citation to *National League of Cities*. *National League of Cities* was but an application of a restriction "implicit in our federal form of government"—the state immunity principle. The reference, both in the cited *Steward Machine* passage and *National League of Cities*, to "contravention of the Tenth Amendment," is unfortunate for reasons that have already been explored, but this *Pennhurst* footnote is clearly a majority confirmation, albeit in dictum, that the state immunity principle is a generic one and applies to requirements imposed upon states as conditions of eligibility for federal financial assistance.[117]

IV

Of all the overlapping groups that seek to promote their particular interests by national legislation today, it is only the states

114. 451 U.S. 1, 17 n.13 (1981).

115. The relevant passage in *Fullilove*, 448 U.S. at 475, merely affirms without specification that some limitation exists. The cited passage in *Lau* makes reference by page number to the particular passage in the *Steward Machine* opinion where Justice Cardozo disavowed addressing whether spending conditions could be imposed that were "unrelated in subject matter to activities fairly within the scope of national policy and power," arguably constituting intrusions by Congress "upon fields foreign to its function." To take seriously any suggestion that Congress's discretion in setting spending conditions is limited to promoting objectives "fairly within the scope of national policy and power" would be to revive James Madison's narrow and rightly repudiated view of Congress's power to spend. It is hardly credible that the *Pennhurst* majority intended to suggest such a radical revolution in doctrine.

116. 301 U.S. at 585 (emphasis added).

117. Reference continues to be made, of course, to Oklahoma v. Civil Service Comm'n, 330 U.S. 127 (1947). If an identical case were to arise today, however, there certainly would be ground to argue that the Hatch Act political activity restrictions conditioning federal highway aid do present a state immunity issue. To raise the issue, of course, is not to decide it: a judgment would have to be made whether the impact of that funding condition were sufficiently comparable to the enormous impact presented by application of the FLSA to state employees that it should be adjudged "undue."

as political communities to whom the Constitution extends special solicitude. This is not from any desire to protect the prerogatives of parochialism, but out of a sober sense that democracy is best promoted by enhancing the capacity of citizens to deal with most matters that concern them closer to home. The importance of federalism in promoting citizen self-government—that essential right of states as political communities in a republican scheme—is so great that it is not to be destroyed by simple majorities in the national legislative forum.

It is a great illustration of the inadequacy of a constitutional jurisprudence that staggers from case to case without an eye on general principles,[118] that most of the judicial and academic commentators on *National League of Cities* still view it as merely a "commerce clause" case—and an anomalous one at that. In reality, it illustrates a sensible, generic, and historically well-founded state immunity principle, the essence of which is thoughtful judgment whether the interests of the nation's constituent political communities in effective self-government are "unduly" impaired. Thus safeguarding the constitutional structure from hasty tampering by transient majorities targeting immediate aims is one of the most important functions that the judiciary can, heretofore has, and must continue to perform.

118. Justice Frankfurter wrote in New York v. United States that "[o]ne of the greatest sources of strength of our law is that it adjudicates concrete cases and does not pronounce principles in the abstract." 326 U.S. at 575. But even he acknowledged that "there comes a time when . . . the process of empiric adjudication calls for a more rational disposition than that the immediate case is not different from preceding cases." *Id.* Frankfurter's "process of empiric adjudication" has merit, of course; but so does the process of "rational disposition," involving the *application* of "abstract" principles. The Constitution is an integrated intellectual construct; and untoward consequences can result from application of one or another of its provisions in isolation without attention to the conceptual structure as a whole. Today's decision of what seems an isolated question might tomorrow work mischief as precedent in an unanticipated quarter; distortions can be caused in a far corner of the fabric by the pulling of some seemingly unconnected thread. The typical common-law type of case by case doctrinal evolution is less appropriate in Constitutional than in other realms of law; for here the constant point of reference must be, not merely the precedents, but rather the coherent (even though abstract) conceptual construct of the Constitution. Only by careful attention to analysis and theory can the practical operating system of liberty and republican government effectively be maintained; for the advantage of a written constitution, if properly designed and used, is precisely that it does establish an integrated and coherent set of abstract concepts, to be modified only through extraordinary deliberation, against which government responses to empiric exigencies can be tested, and by application of which the hand of force can be restrained.